

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SAMUEL AND LOSSIE SINGLETON<sup>1</sup></b>	:	DETERMINATION
	:	DTA NO. 815592
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1991.	:	

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Petitioner, Lossie Singleton, 113-28 212<sup>th</sup> Street, Queens Village, New York 11429, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1991.

Petitioner appeared by Earnest Clay, P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner and the Division of Taxation executed a consent waiving a hearing in this matter and agreeing to have the controversy determined on submission. A letter from the Division of Taxation stating that it would not be filing a brief was received on March 5, 1998, which date began the six-month period for the issuance of this determination.

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<sup>1</sup>The petition in this matter was filed jointly. However, by order dated October 2, 1997, the petition of Samuel Singleton was dismissed. Therefore, this determination deals solely with the petition of Lossie Singleton. (*See*, Finding of Fact “10”.)

After a review of the evidence and arguments presented, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner Lossie Singleton timely filed her request for a conciliation conference.

***FINDINGS OF FACT***

1. The Division of Taxation (hereinafter "Division") issued a Notice of Deficiency (notice number L-011444802) dated May 20, 1996 to Samuel Singleton and Lossie Singleton. The notice was for personal income tax for the year 1991 and set forth tax due of \$4,803.00, interest of \$1,594.61 and penalty of \$2,238.19 for a total amount due of \$8,635.80.

2. Under the heading of "EXPLANATION AND INSTRUCTIONS" the notice provides:

NOTE: Any disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 8/18/96.

\* \* \*

**If we do not receive a response to this notice by 8/18/96:**

This notice will become an assessment subject to collection action.<sup>2</sup>

3. The Division submitted a copy of Samuel and Lossie Singleton's request for a conciliation conference, in the form of a payment document, dated September 20, 1996, and date stamped October 8, 1996 by the Bureau of Conciliation and Mediation Services (hereinafter "BCMS"). The Division also submitted a copy of the envelope containing the request. The postmark on the copy of the envelope submitted reads "2\_ SE"; the second digit after the 2 was not

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<sup>2</sup>August 18, 1996 is the due date for a request for conciliation conference or petition as listed on the Notice of Deficiency. However, the correct due date was August 19, 1996 (*see*, Conclusion of Law "D", footnote 4 .)

clear. The year of the postmark, 1996, is legible. The affidavit of Ms. Seifert, the Division's representative, states that her affidavit was based upon a review of the Division's records (which presumably would have included the original envelope), and that the envelope was postmarked September 23, 1996. Furthermore, a September 23, 1996 postmark is consistent with the legible portion of the postmark on the copy of the envelope submitted as well as the date the document was signed, September 20, 1996. This date does not correspond with the October 8, 1996 date stamped on the document by BCMS, which would indicate that if the document was mailed on September 23, 1996 it took 15 days for the document to be received by BCMS. Neither party attempted to explain this discrepancy or comment on the illegible postmark.

4. A Conciliation Order Dismissing Request, dated November 29, 1996, was issued by BCMS. The reason for dismissing the request was:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on May 20, 1996, but the request was not mailed until September 23, 1996, or in excess of 90 days, the request is late filed.

A petition protesting this order was filed with the Division of Tax Appeals on January 7, 1997.

5. On June 16, 1997 the Division of Tax Appeals received a Notice of Motion and supporting documents filed by the Division requesting an order granting the Division summary determination on the basis that Samuel and Lossie Singleton's request for conciliation conference was filed late.

6. In support of its motion, the Division submitted the affidavits of: Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office.

These affidavits describe the general procedures for the preparation and mailing of notices of deficiency. The affidavits also describe how such procedures were followed in this case.

7. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record (hereinafter "CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in this process an employee of the Mail Processing Center manually changes the date

on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to the Colonie Center Branch of the United States Postal Service in Albany, New York. A postal employee either signs the CMR, affixes a postmark to the CMR, or both. The employee of the Mail Processing Center also requests the postal employee to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multipage CMRs, the pages are connected when delivered to the United States Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

8. In support of its position that the procedures outlined in Finding of Fact "7", were followed in this case, the Division also submitted a copy of the CMR listing notice number L-011444802, the notice at issue in this matter. The CMR consists of 34 pages with 11 entries on each page with the exception of page 34 which has only three entries. It shows a printed date of "05/09/96" on each of the 34 pages. On page one the printed date has a line through it and above it is the handwritten date of "5-20-96". There is a consecutive listing of 366 certified control numbers beginning with P 911 002 002 and ending with P 911 002 367. There is a Postal Service

postmark of May 20, 1996 on each page of the CMR.<sup>3</sup> On the last page next to “TOTAL PIECES AND AMOUNTS LISTED” appears the printed number 366, which is crossed out, the handwritten number 365 which is crossed out, and the handwritten number 364 which is circled. There is nothing else appearing after the words “TOTAL PIECES RECEIVED AT POST OFFICE”. There is a United States Postal Service postmark of May 20, 1996 and initials to the left of the postmark. Mr. Baisley’s affidavit explains the changes made to the “TOTAL PIECES AND AMOUNTS LISTED” as follows:

On page 34 of this certified mail record 366 pieces of mail were listed as being sent to the United States Postal Service. This number was manually changed to 365 and again changed to 364 to reflect the fact that 2 pieces of certified mail were ‘pulled’ from the mailing record. For example, a piece of mail can be pulled to correct a discrepancy in a name or an address. The piece of pulled mail will be segregated from this group of Notices for correction and issuance at another time. A review of this mail record reflects the fact that 2 pieces of mail were ‘pulled’ from page 30. The pieces of mail assigned certified control numbers P 911 002 330 and P 911 002 331 on page 30 of the certified mail log were pulled, a line was placed through the certified number, the notice number and the name and street address of these taxpayers. These deletions are reflected in the change of the total number of pieces of mail listed on page 34. No such mark is made on or near the listing for Samuel Singleton.

Samuel Singleton’s name is listed on page 23 of the CMR. The certified number listed for the notice sent to Samuel Singleton is P 911 022 249 which matches the certified number shown at the top of the notice. The notice number listed on the CMR for Samuel Singleton’s notice is L 011444802 which matches the number appearing on the notice. The name and address of Samuel Singleton are listed next and also correspond to the information set forth on the notice. There is a

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<sup>3</sup>The United States Postal Service postmark is not completely legible on each of the 34 pages of the CMR. It is however, legible on the first and last pages of the CMR and on page 23 where Samuel Singleton’s name appears.

United States Postal Service postmark of May 20, 1996 on page 23 of the CMR.

9. There is no listing on the CMR for Lossie Singleton. The affidavits that were submitted by the Division in support of its motion for summary determination clearly refer to both Samuel and Lossie Singleton as being listed on the notice of deficiency, but only to petitioner Samuel Singleton in regard to the CMR.

10. An order was issued on October 2, 1997 based on Findings of Fact “1” through “9” as numbered in this determination. The order granted the Division’s motion for summary determination with regard to Samuel Singleton, holding that the Division had shown proper mailing of the notice in question and that Samuel Singleton’s request for conciliation conference was filed late. The motion was denied with regard to Lossie Singleton because of questions with the Division’s proof on what, if anything, was mailed to Lossie Singleton at the time the notice was mailed to Samuel Singleton.

The order issued on October 2, 1997 provided that a hearing would be scheduled on the issue of the timeliness of Lossie Singleton’s request for conciliation conference. A consent signed by the parties, waiving any rights to a hearing and agreeing to have the matter decided on submission, was received by the Division of Tax Appeals on November 24, 1997.

11. The Division submitted the affidavit of Thomas Tibbitts, a Senior Programmer Analyst employed by the Division for seven years. He designed the CMR used by the Division and modified the Division’s computer program to create the CMR.

Thomas Tibbitts explained that the program that creates a CMR retrieves taxpayer address information from the Division’s Taxpayer Indicative Data System (hereinafter “TID”). Specifically, he explained that when taxpayers file joint returns TID classifies the individual taxpayers as primary

and joint taxpayers. A primary taxpayer is simply the first name appearing in the label information section of a joint tax return and a joint taxpayer is the second name appearing. He further explained that the program that generates the CMR lists only the name of the primary taxpayer on the CMR. Finally, Mr. Tibbitts explained that he reviewed the CMR at issue and that the reason only Samuel Singleton's name appears on the CMR, as opposed to Samuel Singleton and Lossie Singleton both appearing, is that Samuel Singleton is the primary taxpayer.

12. The Division also introduced another affidavit from James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. He explains that notices of deficiency are folded and placed in windowed envelopes so that the name and address appearing on the notice show through the window. Attached to his affidavit is another copy of the notice in question in this matter, folded and contained in a window envelope. There are three windows in the envelope. Appearing in the window located in the upper left hand corner of the envelope is the Division's return address. Appearing in the window located in the center and at the top of the envelope is certified mail number P 911 002 249. Finally, appearing in the lower left hand window — the window for addressee information — is the following:

“L-011444802-C002-7  
SINGLETON-SAMUEL  
SINGLETON-LOSSIE  
113-28 212 ST  
QUEENS VILLAGE, NY 11429-2312.”

13. Petitioner submitted a sworn statement signed by her representative. Petitioner's representative asserts that Samuel and Lossie Singleton were separated from 1987 until sometime in 1992 and that during that time Samuel Singleton lived and worked in New Jersey. He also stated



that he had Samuel and Lossie Singleton file joint Federal returns for those years, but that for the state return “I filed his state return for the state that he lived and worked in, New Jersey” (Sworn Statement of Earnest Clay, p. 1.). Petitioner’s representative contends the Division issued two notices of deficiency, the notice for 1991 at issue in these proceedings, and a notice for 1992 not in evidence in this matter, and that both of these notices were based upon Samuel Singleton’s filing returns and paying tax in New Jersey rather than New York for those years. Furthermore, petitioner’s representative claims that he timely requested conciliation conferences for both notices simultaneously. However, he was informed by a clerk employed by the Division that he was missing a power of attorney for 1991, and by the time this was filed, the 1991 request was late. Finally, petitioner’s representative asserts that inasmuch as it was determined during the course of a conciliation conference for a 1992 notice that Samuel Singleton did not move back into New York until sometime in 1992, he could not have lived in New York in 1991.

Attached to this statement and submitted as documentation for the statement are: a copy of a request for a conciliation conference dated March 19, 1996 and listing notice number L-011067338-8; a copy of a power of attorney dated March 21, 1996 for 1991 and 1992 income tax matters and listing notice number L-011067338-8; a copy of a BCMS consent document listing notice number L011067338 concerning a deficiency under Articles 22 and 30 of the Tax Law for the year 1992; a copy of a 1991 joint Federal income tax return for Samuel and Lossie Singleton listing an address in Queens Village, New York, unsigned except for the preparer’s signature; and a copy of an unsigned 1991 joint New Jersey state income tax return for Samuel and Lossie Singleton listing an address in Jersey City, New Jersey.

14. Since the Division submitted a letter stating that it would not be filing a brief, it was anticipated that petitioner would not be filing a reply. However, on March 25, 1998 a letter was received from petitioner's representative stating that because the Division had not filed a brief he was requesting that his motion for dismissal of the case be granted. A letter from the Division was received on April 16, 1998 opposing petitioner's motion. Petitioner did not file any motions during these proceedings. Therefore, it is determined that petitioner's representative's letter was merely referring to the information he had previously submitted in support of petitioner's case as set forth in Finding of Fact "13".

15. On July 9, 1998 the Division of Tax Appeals received a letter from petitioner's representative with six pages of attachments as follows: a copy of a January 23, 1997 letter to petitioner's representative from Frank McMahon of the Division of Tax Appeals; a copy of Samuel and Lossie Singleton's 1988 New Jersey Gross Income Tax Nonresident Return; a copy of Samuel Singleton's 1989 W-2 from Pathmark; a copy of Samuel Singleton's 1990 W-2 from Paul's Trucking Corp.; and, copies of Samuel and Lossie Singleton's 1990 and 1991 State of New Jersey Income Tax - Resident Return Homestead Property Tax Rebate applications. Any reply brief filed by petitioner was due by March 30, 1998, at the latest.<sup>4</sup> Since this submission was received over three months later it was disregarded and not considered in this determination.

### ***CONCLUSIONS OF LAW***

A. Where the timeliness of a petition filed with the Division of Tax Appeals is at issue, it is incumbent upon the Division to demonstrate that the notice at issue was properly mailed (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales*

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<sup>4</sup>As noted previously, a reply appeared unnecessary since the Division did not file a brief in this matter.

**& Serv.**, Tax Appeals Tribunal, May 23, 1991). This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of proper mailing arises (*see, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). If the Division is unable to meet this burden, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Brager, supra*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Katz, supra*).

B. The Mahon and Baisley affidavits establish the general mailing procedures for mailing of notices of deficiency. The process begins in the CARTS Control Unit. Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. The notices are placed in envelopes. In the Mail Processing Center, employees weigh and seal the envelopes containing the notices, ensure the proper postage and fees are affixed to the envelopes, compare the information on the envelopes with that on the CMR, count the envelopes, and change the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and the notices are then delivered to the post office. A postal employee either signs the CMR, affixes a postmark to the CMR, or both. The postal employee is requested to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces

listed to indicate that was the number received. Usually on the next day an employee of the Mail Processing Center returns to the post office to pick up the completed CMR. Completed CMRs are then returned to the CARTS Control Unit. In cases of multipage CMRs, the pages are connected when delivered to the United States Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

C. With regard to Lossie Singleton, the CMR submitted, together with the affidavits of Thomas Tibbitts and James Baisley, illustrate that the Division's mailing procedures were followed in this case. The name, address, notice number and certified control number on the notice issued to Samuel Singleton and Lossie Singleton correspond with those listed on the CMR for Samuel Singleton. The date of the Postal Service postmark on the page of the CMR listing the notice at issue, and the last page where the postal service employee's signature is found, indicates the notices were mailed on May 20, 1996. The affidavits of Thomas Tibbitts and James Baisley offer an adequate explanation for Lossie Singleton's name not appearing on the CMR (i.e., only the primary taxpayer on a joint return is listed on the CMR) and demonstrate how the notice, which did list petitioner's name, is placed in the envelope so that both names and the address appeared through the window.

The other possible problem presented by the CMR, in regard to petitioner Lossie Singleton, is that there was no number provided in the space allowed for "TOTAL PIECES RECEIVED AT POST OFFICE" (see, *Matter of Brager, supra*; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The Division has introduced evidence in this matter that was not submitted in either *Brager* or *Roland*. The affidavits submitted in those cases stated that on the CMR a Postal Service

employee had circled the pieces listed number to indicate the pieces received at the post office, instead of writing in the number in the space provided on the CMR. The Tribunal held those affidavits insufficient because there was no mention of the basis of the affiant's knowledge. In the present matter Mr. Baisley's affidavit indicates that Mail Processing Center staff request the postal employees to either write in the number of pieces received at the post office in the space provided, or circle the pieces listed to indicate the number of pieces received at the post office. The CMR submitted in this matter has a circle around the number of pieces listed. Therefore, pursuant to the procedures of the Division, this is a properly completed CMR.

The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*see, Matter of Katz, supra*). Since there is both with regard to petitioner, the Division is entitled to the presumption of proper mailing in this case. Notice of Deficiency number L-011444802 for personal income tax for the year 1991 was issued and mailed to Lossie Singleton on May 20, 1996.

D. The remaining question is whether petitioner timely filed her request for conciliation conference. Pursuant to Tax Law § 2(1), § 170(3-a) and § 689(b), she had 90 days from the mailing of the Notice of Deficiency to file a request for a conciliation conference with BCMS. Counting 90 days from May 20, 1996 results in an August 19, 1996 due date for the request.<sup>5</sup> The postmark on the copy of the envelope which contained the request submitted by the Division is illegible. When a postmark is illegible it is usually the burden of the party required to file the document to prove the date of the postmark (20 NYCRR 3000.22[a][2][iii]). However, since in this case the Division

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<sup>5</sup>90 days from May 20, 1996 was August 18, 1996 which was a Sunday. Accordingly, Monday, August 19, 1996 was the due date for the request (*see, Tax Law § 691[c]; General Construction Law §§ 20, 25-a; Matter of American Express Co., Tax Appeals Tribunal, July 3, 1991*).

submitted a copy of the envelope with an affidavit based upon the records of the Division (which presumably include the original envelope), stating that September 23, 1996 was the date of the postmark and petitioner did not respond to this statement of fact, September 23, 1996 is deemed the date of filing.<sup>6</sup>

Petitioner's assertions that simultaneous requests for conciliation conferences for the notice at issue and another notice for the tax year 1992 were timely filed are simply not supported by any evidence. First, the copy of the request submitted by petitioner does not list any year and lists a notice number that is not in evidence in this proceeding. There is nothing on the face of this request that indicates in any manner that the notice at issue was being protested. Second, there is no proof of the date of mailing or receipt by BCMS of this request. Third, the request is dated March 19, 1996. Therefore, this request could not possibly have concerned the notice at issue in this case because the notice was not issued until May 20, 1996. Furthermore, even if petitioner is asserting that this pre-notice protest should have stopped the 90-day period from running, a protest filed prior to a statutory notice being issued is not considered a valid protest for purposes of tolling the 90-day requirement (*see, Matter of West Mountain Corp. v. State of NY Dept. of Taxation and Finance*, 105 AD2d 989, 482 NYS2d 140, *affd* 64 NY2d 991, 489 NYS2d 62; *Matter of Best Ray Pizza*, Tax Appeals Tribunal, May 16, 1996).

The notice was issued on May 20, 1996, making petitioner's request for conciliation conference due by August 19, 1996. The request was filed on September 23, 1996 and received on October 8, 1996. There being no timely request for a conciliation conference, the petition must be

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<sup>6</sup>Since petitioner submitted no evidence on this issue, without the Division's evidence the date of filing would have been the date of receipt which was October 8, 1996.

dismissed (*see, Matter of 3410 Pons Food*, Tax Appeals Tribunal, September 7, 1995; *Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

E. Having held that the petition must be dismissed as untimely, the Division of Tax Appeals has no jurisdiction to entertain any substantive arguments made in support of the petition. Therefore, I am unable to reach petitioner's arguments concerning residency issues for the tax year 1991 (*see, Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997; *Matter of Jenny Oil Corp.*, Tax Appeals Tribunal, June 20, 1996).

F. The petition of Lossie Singleton is dismissed.<sup>7</sup>

DATED: Troy, New York  
September 3, 1998

/s/ Roberta Moseley Nero  
ADMINISTRATIVE LAW JUDGE

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<sup>7</sup>The petition of Samuel Singleton was previously dismissed by order dated October 2, 1997.